THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2018-UP-317
Submitted June 1, 2018 – Filed July 11, 2018
Appellate Case No. 2017-000479

LEVI THOMAS BROWN

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

PETITION FOR A WRIT OF *CERTIORARI*

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CASES

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 20, 2018.

QUESTION PRESENTED

1. Did the Court of Appeals err when it failed to rule on whether Petitioner's injuries sustained in a vehicle-to-vehicle drive-by shooting were foreseeably identifiable within the normal use of an automobile; and rather affirm the trial court by finding Petitioner did not appeal the circuit court's ruling concerning a policy exclusion?

STATEMENT OF THE CASE

Levi Thomas Brown filed the Summons and Complaint in this action on January 25, 2016. Defendant State Farm Fire and Casualty Insurance Company, by and through the South Carolina Department of Insurance accepted service of the Summons and Complaint on April 4, 2016. Levi Thomas Brown brought this action seeking a declaratory judgment from the Court as to the parties' respective rights and obligations under an automobile insurance policy issued by State Farm Fire and Casualty Insurance Company. State Farm Fire and Casualty Insurance Company served its Answer on Levi Thomas Brown on May 2, 2016.

State Farm Fire and Casualty Insurance Company filed its Motion for Summary Judgment on October 4, 2016 and Levi Thomas Brown filed his cross Motion for Summary Judgment on October 31, 2016. The parties have polarized arguments as to whether Levi Thomas Brown's injuries arose out of the ownership maintenance or use of an uninsured vehicle. The parties stipulated to the facts of the case and requested the Court hear the motions as a dispositive bench trial.

On January 6, 2017, the Honorable W. Jeffrey Young heard the parties' motions for summary judgment in Charleston County, South Carolina.

The trial court's Order was filed February 7, 2017. The trial court ruled in favor of State Farm Fire and Casualty Insurance Company and held the injuries sustained by Levi Thomas Brown are not covered by the subject State Farm uninsured motorist policy. Levi Thomas Brown received written notice of the entry of the Order on February 14, 2017. Levi Thomas Brown served his Notice of Appeal on State Farm Fire and Casualty Insurance Company on February 16, 2017.

Levi Thomas Brown filed and served his Initial Brief and Designation of Matter to be Included in the Record on Appeal on May 19, 2017. State Farm Fire and Casualty Insurance Company filed and served its Initial Brief and Designation of Matter to be Included in the Record on Appeal on July 14, 2017. Thereafter, the Court of Appeals received the Record on Appeal and Levi Thomas Brown's Final Brief on August 14, 2017 and received State Farm Fire and Casualty Insurance Company's Final Brief on August 28, 2017.

On July 11, 2018, the Court of Appeals affirmed the Final Order of the lower court by way of Unpublished Opinion No. 2018-UP-317 holding Petitioner did not appeal the circuit court's ruling concerning the insurance policy exclusion for injuries sustained by firearms. Petitioner filed his Petition for Rehearing on July 25, 2018, and Respondent's Return to Motion for Rehearing was filed and served on August 16, 2018. The Court of Appeals filed its Order on Petitioner's Petition for Rehearing on September 20, 2018.

ARGUMENT

The Court of Appeals mistakenly determined Respondent's policy exclusion was an independent basis of the trial court's decision that Petitioner's injuries were not covered by State Farm's uninsured motorist policy. Without a determination as to 1) whether the trial court erred in failing to follow established precedent and 2) whether the trial court erred in finding the

foreseeably identifiable with the use of the automobile element articulated in *Aytes* and *Bookert* is inconsistent with *Howser* and *Towe*, the injury by firearm exclusion in State Farm's policy cannot be used as an independent determination of its own lawfulness.

Because the policy exclusion in and of itself is not an independent basis for determining whether Respondent's grounds for denying Levi Thomas Brown's claim for injuries sustained in a vehicle-to-vehicle drive-by shooting, this Court must order The Court of Appeals to examine the trail court's order granting State Farm's motion for summary judgment and make a determination as to whether the trial court followed established precedent and whether the foreseeably identifiable with the use of an automobile element articulated in *Aytes* and *Bookert* is inconsistent with *Howser* and *Towe*.

I. The Court of Appeals erred in failing to determine the policy exclusion is dependent upon the trial court's determination as to whether injuries sustained in a vehicle-to-vehicle drive-by shooting were foreseeably identifiable within the normal use of an automobile.

The Court of Appeals disposed of Levi Thomas Brown's appeal on the grounds that he did not appeal the circuit court's ruling concerning the policy exclusion not covering injuries from firearms. (Appendix 340).

Issue One in this matter requires the Court of Appeals to make a determination as to whether the injuries sustained by innocent victims of vehicle-to-vehicle drive-by shootings are "foreseeably identifiable within the normal use of an automobile." *Wausau Underwriters Inc. Co. v. Howser*, 422 S.E.2d 106, 309 S.C. 269 (1991). The Court of Appeals was asked to make a determination of how *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 74 (1998) and *State Farm Mut. Auto Ins. Co. v. Bookert*, 523 S.E.2d 181, 337 S.C. 291 (199) have or have not changed the precedent established in *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1993) and *Wausau Underwriters Inc. Co. v. Howser*, 422 S.E.2d 106, 309 S.C. 269 (1991).

Issue Two involves a written policy exclusion Respondent has begun including in its automobile policies that broadly excludes all claims for injuries resulting from firearms. Issue Two was cited in very short form in the arguments by Respondent at the trial court level as well as in its brief to the Court of Appeals. Because Issue Two does not stand on its own as a lawful ground for the trial court's ruling, and because Issue Two is utterly dependent upon a determination of Issue One, Petitioner framed his argument around Issue One. Further, a policy exclusion cannot exclude coverage contrary to the common law and thus the Court of Appeals is unable to hold Issue Two as the grounds for its decision and the Court of Appeals decision as to Issue One would render Issue Two moot.

After a detailed analysis of Issue One and the applicable case law, the only section of the trial court's Final Order addressing Issue Two is as follows:

> State Farm also submits this matter should be excluded because the policy contains an exclusion "for an insured whose bodily injury results from the discharge of a firearm." Plaintiff argues this provision is invalid. Defendant counters that there is no requirement to insure firearm injuries or any injuries that do not arise out of the use of [a] vehicle. Based on the facts of this case, there is no requirement that State Farm insure this gunshot injury and the exclusion adds further reason for the court to conclude that no coverage exists.
>
> Based on the stipulated facts, the policy language, and the law of South Carolina as established by *Aytes* and *Bookert* and their progeny, this Court finds that the gunshot injuries sustained by Levi Brown are not covered by the State Farm uninsured motorist policy[.]

(Appendix 8-9). The trial court's Final Order decided Issue One on its merits in detail and then, because of its analysis of Issue One, the trial court determined the policy exclusion was not unlawful and allowed to continue as an exclusion. Noticeably, the trial court's Final Order does not opine that in spite of clear precedent that makes the court decide this matter in favor of Levi Thomas Brown, alas, there is the firearm policy exclusion that stands to exclude coverage for these

types of injuries. If the trial court had in fact ruled in favor or Levi Thomas Brown, the exclusion in Issue Two would have been held to be inapplicable as the policy could not unlawfully exclude coverage for injuries foreseeably identifiable within the normal use of an automobile.

The trial court's Final Order concludes that no coverage exists for the injuries sustained by Levi Thomas Brown was "based on the facts of the case." (Appendix 8). The policy exclusion is not an independent basis for the trial court's decision – it was and is completely dependent upon the ruling as to Issue One.

Levi Thomas Brown sought the guidance of the Court of Appeals as to a determination of the lawfulness of Respondent's denial of coverage and the trial courts affirmation of the same. The Issue Two policy exclusion can be a basis for denying coverage only if the law does not take a position about the unlawfulness of such exclusion. Whether it cites the common law as the grounds for the exclusion or cites its policy language, the merits of the case presented to the Court of Appeals depend on the two arguments presented in Levi Thomas Brown's Final Brief: 1) the trial court's errors in not following the *Howser* and *Towe* precedent that established coverage for vehicle-to-vehicle drive-by shootings; and 2) the trial court's errors in reading *Aytes* and *Bookert* too broadly such that they effectively overturn precedent without the South Carolina Supreme Court expressly stating its intent to do so.

The Court of Appeals Order cites *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 903, and *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) in its affirmation of the trial court's Final Order. These two cases support the principle that an appellate court should affirm a trial court ruling unless all grounds have been appealed, "because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). However, in order for an unappealed ground of a trial court decision to remain as a valid basis for the trial court's

decision, the ground that was determined to not have been appealed must be a completely distinct and independent basis for the lower court's ruling. Otherwise, the appellate court's ruling on a dependent issue would inevitably decide the dependent issue and render a discussion of that second issue moot.

In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 903 (2010), a wrongful death case with numerous causes of action and defenses arising out of police use of force, this Court held that failure to appeal the trial court's ruling as to the S.C. Tort Claims Act granting the police immunity for the method of providing protection for someone in custody required the appellate court to affirm the trial court, because this Tort Claim Act issue was a fourth and independent ground for the lower court's decision that was not appealed. The appellant in that case only appealed three other independent rulings of the trial court and forced the appellate court into the position of leaving a trial court ruling against the appellant regardless of how the court decided the other three issues. Similarly, in *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996), a medical malpractice case with damages sought by an injured woman's spouse by way of loss of consortium, the spouse's appeal failed because he only appealed the trial court's ruling that his claim was derivative of his wife's claims and did not appeal the independent (and substantive) ground that decided his wife's appeal -- the discovery rule. The husband's failure to appeal the discovery rule issue placed this Court in the position of having to affirm the trial court as to the husband, because ruling on the derivative nature of consortium would not undo the law of the trial court's decision.

It is only necessary for the Court of Appeals to rule on the substantive common law issues, that is, 1) whether the trial court erred in failing to follow established precedent; and 2) whether the trial court erred in finding that the "foreseeably identifiable with the use of the automobile" element articulated in *Aytes* and *Bookert* is inconsistent with *Howser* and *Towe*. If the Court of

Appeals were to read *Aytes* and *Bookert* as compatible with and not overturning *Howser* and *Towe*, and thus finding Levi Thomas Brown's injury was on the common law basis of foreseeably identifiable with the normal use of an automobile, it would not be necessary for the Court of Appeals to rule on the trial court's observation that the policy contained an exclusion for claims arising out of the use of a firearm. Further, this Court's concern in *Jones* and *Anderson* would not be present in the matter at bar, that is, the Court being forced to leave an unappealed issue from the trial court as dispositive of the case.

CONCLUSION

For the foregoing reasons, Levi Thomas Brown asks this Court to issue a writ of *certiorari*, reverse the Court of Appeals, and order the Court of Appeals to make a determination as to the issues on appeal.

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November 13, 2018

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CERTIFICATE OF MAILING

I certify that a true copy of the Petition for Writ of *Certiorari* and Appendix has been placed in the U.S. Mail, first class delivery, postage prepaid, and addressed as follows:

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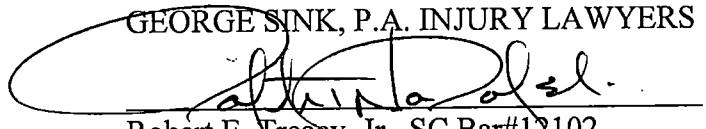

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this 13th day of November 2018.

Sarah Dawson

Notary Public for South Carolina
My Commission Expires: 12/5/2027

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CERTIFICATE OF MAILING

I certify that on November 13, 2018, one original and eight copies of the Petition for Writ of *Certiorari* and one unbound and three bound copies of the Appendix have been paced in the U.S. Mail, first class delivery, postage prepaid, and addressed as follows:

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina Clerk of Court
P.O. Box 11330
Columbia, SC 29211

Additionally, one copy of the Petition for Writ of *Certiorari* has been placed in the U.S. Mail, first class delivery, postage prepaid, and addressed as follows:

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

[signature page to immediately follow]

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